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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KENYUN DESHAWN ROBINSON, Defendant and Appellant.	B166845 (Los Angeles County Super. Ct. No. NA051400)

Appeal from a judgment of the Superior Court of Los Angeles County. Arthur Jean, Jr., Judge. Affirmed.

Janyce Keiko Imata Blair, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Mary Sanchez and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant Kenyun Deshawn Robinson of the 1992 murder of Matilda Martinez in violation of Penal Code[1] section 187, subdivision (a). The jury found true the allegations of personal weapon use (§ 12022.5, subd. (a)) and the special circumstance of robbery (§ 190.2, subd. (a)(17)). The trial court sentenced appellant to life without the possibility of parole and an additional four years for the personal weapon use.

Appellant appeals on the ground that the trial court prejudicially erred in admitting statements appellant made to police during an interview that was continued in violation of *Miranda*.[2]

FACTS

I. Prosecution Evidence

On October 18, 1992, teenaged twin brothers Jason and Robert Kennedy lived at 1704 Junipero Avenue in Long Beach. The Kennedy brothers were White. On that day they walked to Eddie's Liquor Store in the afternoon and saw several Black males standing on the corner near the store. One of the Black males, later identified as appellant, approached Jason, turned him around, and put a gun to his back. Appellant told Jason to give him all of his money, or appellant would blow Jason away. Because Jason did not believe the gun was real, he grabbed the gun and twisted it to point at appellant's face. Jason told appellant "'Don't fuck with me.'" Jason saw appellant's face and recognized him as someone he had seen around the neighborhood. Jason remembered that appellant was wearing a blue and white bandana, a dark shirt, and black jeans. Jason took the gun away from appellant, but gave it back to him.

Jason and Robert proceeded into the liquor store. Robert wanted to call the police, but Jason refused because he believed the gun was a fake and because he feared retaliation. When the Kennedy brothers left the store, appellant again approached Jason and put the gun to the back of Jason's head. Appellant said he would "'blow this fucking

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1 All further references to statutes are to the Penal Code unless stated otherwise.

2 *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

White boy away.'" Jason told him to go ahead and not talk about it. Jason told his aunt about the incident upon returning home.

That afternoon, Jason and Robert were playing in their backyard when they saw the group of Black males from Eddie's Liquor Store throwing rocks at each other in an area behind the Kennedys' backyard. Jason heard one of them say something about someone having a gun. Appellant was among the men, and he was wearing a white Dodger shirt, a bandana, and black pants.

On the same day, at approximately 4:00 p.m., Jason heard a woman screaming. As he ran to open the front door, he heard the "pop" of a gunshot that was not very loud and seemed to come from a .22-caliber gun. Jason saw the person from the liquor store earlier that day, later identified as appellant, trying to take a purse from a lady who was holding her neck. Appellant was the only person near the woman, and he grabbed the purse and ran. The woman was later identified as Matilda Martinez. Jason did not actually see appellant shoot Martinez. As appellant ran, his path took him towards the Kennedy house and Jason was watching him. Martinez was holding her neck and barely walking, and she finally fell over.

Robert also heard a gunshot and ran to the front porch. He saw appellant and Martinez struggling. Appellant ran away, and Martinez walked around in a daze while holding her neck. Robert recognized appellant as the same person who had pulled the gun on him and Jason at Eddie's Liquor Store. Robert saw the person's face because he was running towards Robert and his brother. Robert also saw one of the males who was with appellant at the liquor store run down the street, but that male was a long way ahead of appellant. The Kennedys called the police.

Long Beach Police Officers Louie Galvan and Sue Nelson responded to the scene of the shooting. Galvan saw Martinez lying on the street near an apartment building. Jason told the officers that he had heard struggling and went to the door. He heard a "pop" and when he looked outside he saw a Black male ripping a purse from a woman. Jason described the robber as a Black male, 16 or 17 years old, 150 to 160 pounds, and wearing a dark blue and white patterned bandana, a white Dodger shirt, and black pants.

Jason told police that the robber was the "same guy" who pulled the gun on him at Eddie's Liquor Store. Robert also told this to the police. Robert described the person who ran away from the shooting as an African-American, about 150 pounds, wearing dark jeans, a dark Dodger shirt, and a blue bandana.

In 1992, Trinidad Bedolla lived at an apartment complex in Long Beach. He was 11 or12 years old at the time. Appellant and Raymond Belton, who was a friend of Bedolla, lived in the same complex. Bedolla saw appellant once or twice a week. On the day of the shooting, at approximately 2:00 or 3:00 p.m., Bedolla saw appellant at Eddie's Liquor Store and appellant showed Bedolla a gun. Bedolla saw White twin brothers approach the front of the liquor store. Bedolla went home, and appellant stayed at the liquor store. Later, Bedolla heard shots and police sirens. He went outside and saw a woman lying on the ground. Bedolla testified at appellant's trial that he did not say anything to a police officer at the scene of the shooting. Shortly thereafter, he changed his testimony and said that he did give police some information about what he saw and heard that day. He remembered that he told an officer, later identified as Officer Ponce, that "D," whose real name was "Kenyun," was the person who had shown him a gun at Eddie's Liquor Store earlier that day. Bedolla told Officer Ponce that he did not see the shooting.

One of the detectives who interviewed Bedolla in October 1992, John Boston, testified that Bedolla told him that on October 18, 1992, at approximately 2:30 p.m, he and Belton were at Eddie's Liquor Store. Bedolla said that a friend named "D," whom he later identified as Kenyun (appellant), showed him a small gun. Appellant was wearing dark pants, a white T-shirt, and perhaps white shoes. Appellant wore a bandana on his head that was either blue or blue and white. Appellant told Bedolla and Belton, "Watch this," and he approached the White twin brothers who were walking to Eddie's Liquor Store. Appellant put a gun to the back of one of the brothers and demanded money. The brothers just walked away from appellant and went into the store. Bedolla and Belton went to a video store and then went home.

With respect to the shooting, Bedolla at first told Detective Boston that at approximately 6:00 p.m., he heard a gunshot as he was standing in front of his house. He then went to the place where a woman had been shot. Bedolla later told Boston that he was walking with Belton and appellant on 17th Street when appellant told them, "'Wait here, watch this.'" Appellant approached a lady, grabbed her purse, and started to pull it. She pulled back and he shot her. Appellant then ran away on 17th Street in an eastbound direction, and Belton and Bedolla ran away also. Bedolla cried during the interview and Boston believed Bedolla said he was afraid. When Boston put Belton and Bedolla in the same room, Bedolla started crying and said that everything he had said about the shooting was a lie and that he really had not seen it. Bedolla said that everything that he said about the incident at Eddie's Liquor Store was true.

Bedolla recalled at trial that homicide detectives went to his school to speak with him about Martinez's murder shortly after the shooting. They took his photograph. Bedolla believed he told them what had happened at the liquor store. He identified appellant from a photographic lineup as the person who had shown him the gun there. When asked by the prosecutor about items of information he may have given the detectives, Bedolla repeatedly stated he could not recall any more of his statement to the detectives. Bedolla told his friend Belton what the police detectives had asked him. Bedolla denied he cried while Belton was present.

On October 18, 1992, Richard Silva lived at 1710 Junipero Avenue. In the late afternoon, he heard a gunshot. A short time before that, Silva had seen appellant and two other kids throwing rocks at each other. Silva had seen appellant many times in the neighborhood. After Silva heard the gunshot, he saw two kids running and then saw appellant running around the bend. Appellant was wearing a black bandana. Later on, Silva was taken to a field lineup. Because of the "code" of the neighborhood he pretended that he did not recognize appellant. Appellant was dressed all in white at the lineup and had no bandana, whereas he had worn blue pants, the bandana, and perhaps a white shirt earlier. Because of the neighborhood code, Silva also failed to identify appellant in a photographic lineup shown him by Detective Boston. In 1992, Silva told

Officer Galvan that after hearing the gunshot, he saw a male Black run away from the victim's body. Silva described the Black male as approximately 16 or 17 years old, thin, from five feet six inches to five feet eight inches tall, and wearing a black shirt, blue or black pants, and a blue or black bandana. Silva told the district attorney and a Detective McMahon before trial that appellant was the person he had seen running from the woman on October 18, 1992.

Long Beach Police Officer Jacinto Ponce stopped appellant on the night of the shooting because he matched the description of the suspect in the attempted robbery at Eddie's Liquor Store. Ponce drove Jason and Robert to an alley behind Junipero Avenue where the twins viewed a lineup. Jason and Robert both said words to the effect of "'Yeah, that's him'" in reference to appellant. Jason and Robert meant that appellant was the person involved in both the attempted robbery and the shooting. Ponce believed the twins were identifying the person who had attempted to rob them earlier in the day at the liquor store. Ponce testified at appellant's trial that, to his knowledge and recollection, he did not know at the time of the field lineup that the Kennedys had witnessed the murder of Martinez. Jason recalled that appellant was not wearing a bandana and was wearing a white T-shirt and black pants in the lineup. Robert recalled that appellant was wearing all white clothing in the field lineup.

After the field showup with the Kennedys, Officer Ponce searched appellant's home and recovered a black and white T-shirt, a black and white bandana, and dark blue jeans. Ponce believed appellant to be a suspect only in the attempted robbery.

Gunshot residue was collected from appellant's hands on October 18, 1992. Analysis revealed that the particles found were consistent with a person handling a gun that he has fired himself, or being within the cloud of primer discharge, or coming in contact and picking up something that had gunshot residue on it.

Dr. Paul Lindsay, a deputy medical examiner, conducted an autopsy of Martinez's body and determined that she died from a gunshot wound to the neck. A .22-caliber bullet was recovered from Martinez's body. The contemporaneous murder investigation did not lead to an arrest.

In 1998 all the unresolved cases in the Long Beach Police Department were assigned to detectives, and the homicide of Matilda Martinez was assigned to Detective Paul Edwards. He began looking at the case in October 2000 and read all the reports. The first witness he contacted was Jason Kennedy, who surprised Edwards by saying that the person who ran from the shooting was the same person who had tried to rob him at Eddie's Liquor Store. Edwards separately showed Jason and Robert a photographic lineup that included a photograph of appellant taken on the day of the shooting. Both Jason and Robert selected appellant's photograph as the person involved in the shooting and in the attempted robbery.

On November 7, 2001, Edwards interviewed appellant in an interview room at the police station. Edwards gave appellant a form advising him of his legal rights. At Edwards's direction, appellant read aloud from the form. When appellant reached line No. 6, which stated, "'I want to talk,'" appellant said, "'I don't want to talk.'" Appellant then asked Edwards what Edwards wanted to talk about. Edwards responded that he was investigating a 1992 murder, and that he believed that appellant could give him information.

Edwards then asked appellant if he understood his constitutional rights. Appellant responded that he did. Edwards asked appellant to sign the form, but appellant refused to do so. Appellant again asked Edwards what he wanted to talk about.

In response, Edwards's partner asked appellant if he remembered where he lived in 1992. Appellant responded with an address. Edwards's partner asked appellant if he remembered what he was arrested for at that time. Appellant responded that he was arrested for strong-arm robberies or burglaries. Edwards explained that robberies were thefts of persons and burglaries were thefts of houses or property, and that appellant was actually arrested for a robbery. Edwards said that appellant had "tried to rob a lady at 17th and Junipero and basically it had gone wrong and that he had shot her and killed her." Appellant said he did not shoot anyone, and he could not remember anything from back then because it was such a long time ago. Appellant said he did not want to talk to the detectives, then immediately asked them another question about the incident.

Edwards then asked appellant if he remembered his friends Trinidad and Raymond. Appellant responded that he did not. Edwards showed appellant photographs of Trinidad Bedolla and Raymond Belton. Appellant stated that he still did not remember them. Edwards showed appellant a photographic lineup, and appellant identified himself. Edwards then asked appellant if he remembered White twins living in the neighborhood, and appellant said he did not remember them. Appellant then stated that he had been arrested because "some White guy" had accused him of robbing him. Immediately after saying that, without being asked any further questions, appellant said that the White guy took appellant's gun away from him. Appellant said that he could not remember anything else about the attempted robbery at Eddie's Liquor Store because, back in 1992, he was high on "sherm" and other drugs.

Edwards interviewed Bedolla on August 9, 2001. At trial, Bedolla denied or could not recall that he told Edwards that he, appellant, and Belton walked to Eddie's Liquor Store and "hung out" there on October 18, 1992. Bedolla told Edwards that during his post-shooting interview he was scared because he had heard that he should not be a "snitch."

II. Defense Evidence

Renee Robinson, appellant's mother, testified that on the late afternoon and early evening of October 18, 1992, appellant was watching television with her and her husband Ronald Hammond, who had since passed away. Robinson heard a gunshot, and a few minutes later, appellant's two younger brothers ran into the apartment and said that a lady had been shot. Appellant was told not to go out, but he did so anyway. Later on, police arrived and asked to search the apartment. Police removed some clothing from the room shared by appellant and his older brother. Robinson testified that appellant did not take PCP or sherm in 1992.

Criminalist Kenneth Sewell examined clothing taken from appellant and determined there was no blood on any of it. After looking at photographs of blood drops from the scene of the Martinez shooting, Sewell was of the opinion that the blood drops

were consistent with blood that fell to the ground under the force of gravity from a venous injury. A venous injury would not spurt out blood.

The parties stipulated that in November 1992, a defense investigator looking into the attempted robbery of Jason Kennedy interviewed Robert Kennedy. Robert said that he had never seen appellant before the attempted robbery.

DISCUSSION

I. Proceedings Below

The record shows that a hearing under Evidence Code section 402 was held prior to the testimony of Detective Edwards before the jury. Edwards testified at the hearing that he interviewed appellant on November 7, 2001. He commenced the interview by advising appellant of his rights pursuant to a form called the "Long Beach Police Department Advisement of Legal Rights." Edwards wrote appellant's name in the first line and asked appellant to read the form aloud, which appellant did. When appellant read line No. 6, which reads "'I want to talk,'" appellant said, "'I want to talk. I don't want to talk,'" "as if he was asking himself the question."[3] Immediately after he said "'I don't want to talk,'" appellant asked Edwards what it was that Edwards wanted to talk to him about. Edwards told appellant that he and his partner were investigating a murder that occurred in 1992, and they believed appellant had some information that could assist the police. Edwards asked appellant if he understood his rights and asked appellant to sign the form to indicate he understood his rights and wished to talk to the police officers. Appellant refused to sign the form.

After refusing to sign the form, however, appellant immediately asked the detectives what murder it was that they were talking about. Edwards said he took this question from appellant as an implied waiver. In response to appellant's question, Edwards's partner asked appellant where he lived on October 19, 1992, and appellant answered him. Edwards's partner asked appellant what he was arrested for in 1992. Appellant said he was arrested for strong-arm robberies or burglaries, and the two

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[3] Detective Edwards identified this remark as the first time appellant invoked his right to silence. The trial court also considered this the first invocation.

detectives explained to appellant the difference between robberies and burglaries. Edwards then told appellant "that he had tried to strong-arm a lady at 17th and Junipero and that it had gone wrong and that he had shot and killed her." Appellant said he "'didn't shoot anyone.'"

Appellant again said he did not want to talk to the officers and again immediately asked them to tell him about the incident.[4] Edwards told appellant that he could perhaps jog appellant's memory, and he continued asking appellant questions. When asked if he remembered two of his friends, Trinidad (Bedolla) and Raymond (Belton), appellant replied that he did not remember them. The detectives questioned appellant about the murder, and they showed him several photographs. The only photograph appellant recognized was his own lineup photograph. He did not recognize Bedolla or Belton.

The detectives asked appellant if he remembered two White twins who lived in the neighborhood, and appellant did not remember them. Edwards told appellant he was arrested "back then" for a robbery and that the attempted robbery victims were the White twins. Appellant told the officers he remembered a White male saying that appellant had robbed him. Immediately after saying this, appellant told the officers, without being asked any questions, that the White man took the gun from him during the robbery. Edwards told appellant that he also wanted to talk to him about that incident, and appellant responded that he did not remember anything else. Appellant said he smoked a lot of "sherm" at the time and could not remember. Edwards told appellant that there were two sides to every story and that no one else could speak for him. At that point appellant again said he did not want to talk.[5]

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[4] Detective Edwards identified this instance as the second time that appellant said he did not wish to talk and immediately asked a question. The court also considered this the second invocation.

[5] Detective Edwards identified this instance as the third time appellant invoked his right to silence. The trial court also considered this the third invocation of appellant's rights. The court did not admit any statements made by appellant after this point.

Edwards told appellant at that point that it was important for appellant to tell the police his side of the story and that if he had just robbed the lady and the gun went off accidentally, then appellant should say so. Appellant said he could not remember anything from back then. Edwards's partner asked appellant if he remembered talking to two detectives at the time of his arrest in 1992, and appellant said he did not remember. Edwards showed appellant photographs of the murder victim, and he looked at them for "not even a second" and looked away. After that, appellant said he wanted to talk to his mother. Edwards told appellant that he was 25 and able to make his own decisions. Appellant said he did not want to talk anymore, and the interview was concluded.

Edwards told appellant at the end of the interview to talk with his mother and think about it and that perhaps they would return the following day and talk to him some more. When the two detectives returned the following day, appellant said he did not want to talk and had not spoken with his mother. The detectives did not advise appellant of his rights again or ask him to sign the waiver form. Appellant said he wanted to go to court and find out "what it was all about."

After Edwards's testimony at the hearing, the court noted that there were four instances of appellant saying "'I don't want to talk to you.'" The court verified from Edwards that, in the first two instances, appellant asked the officers a question immediately after saying he did not want to talk to them. The third instance occurred after Edwards showed appellant the lineup photographs and after appellant made the statements about being arrested for robbery and having the gun taken away from him by the intended victim. Edwards told appellant that even if he was high on "sherm" it was important to tell his story, and appellant said he did not want to talk. Edwards acknowledged to the court that after this instance, appellant did not ask another question.

The court heard argument from counsel and determined that appellant initiated the conversations by questioning the detectives up until the third instance of appellant saying he did not wish to talk. The court stated appellant was, in fact, equivocating, and Edwards could properly rely on what he had considered an implied waiver.

Edwards later testified before the jury about his interview with appellant, as recounted in the facts section of this opinion.

II. Standard of Review

"In considering a claim that a statement or confession is inadmissible because it was obtained in violation of a defendant's rights under *Miranda, supra,* 384 U.S. 436, the scope of our review is well established. 'We must accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if they are substantially supported. [Citations.] However, we must independently determine from the undisputed facts, and those properly found by the trial court, whether the challenged statement was illegally obtained.' [Citations.] We apply federal standards in reviewing defendant's claim that the challenged statements were elicited from him in violation of *Miranda*. [Citations.]" (*People v. Bradford* (1997) 14 Cal.4th 1005, 1032-1033.) "'Although we independently determine whether, from the undisputed facts and those properly found by the trial court, the challenged statements were illegally obtained [citation], we "'give great weight to the considered conclusions' of a lower court that has previously reviewed the same evidence." [Citations.]'" (*People v. Whitson* (1998) 17 Cal.4th 229, 248.)

III. Relevant Authority

In *Miranda*, *supra*, 384 U.S. 436, the United States Supreme Court held that the prohibition against compelled self-incrimination contained in the Fifth and Fourteenth Amendments mandates that suspects cannot be subjected to custodial interrogation until they have been advised of the right to remain silent and the right to have counsel present during questioning. A suspect may, however, knowingly and intelligently waive these rights following advisement. (*Id*. at p. 479.) The waiver may be either express or implied, but it must be knowing and voluntary, i.e., the product of a free and deliberate choice, and made with a full awareness of the nature of the right waived and the consequences of such a waiver. (*Moran v. Burbine* (1986) 475 U.S. 412, 421; *North Carolina v. Butler* (1979) 441 U.S. 369, 373-376.) In assessing whether these criteria were met, we must consider the totality of the circumstances while bearing in mind the particular background, experience and conduct of the suspect. (*Moran v. Burbine*, *supra*,

at p. 421; *North Carolina v. Butler*, *supra*, 441 U.S. at p. 374.) If the suspect was advised of his rights, said he understood them, did not request an attorney, and chose to speak to police, an implied waiver may be found. (*Moran v. Burbine*, *supra*, at pp. 422-423; *People v. Sully* (1991) 53 Cal.3d 1195, 1233; *People v. Johnson* (1969) 70 Cal.2d 541, 558, disapproved on another point in *People v. DeVaughn* (1977) 18 Cal.3d 889, 899, fn. 8.) California law is in accord with federal cases in stating that an express waiver is not required. (See *People v. Whitson*, *supra*, 17 Cal.4th at pp. 247-248, and cases cited therein.)

IV. Appellant's Argument

Appellant contends that evidence of statements he made during his police interview were improperly admitted into evidence. He states that a defendant's initial refusal to sign a waiver of his *Miranda* rights is an assertion of those rights, and all further attempts at interrogation should cease.

With respect to appellant's first invocation of his *Miranda* rights, appellant claims that Edwards's words and actions constituted an interrogation because their very subject -- the 1992 murder -- called for incriminating responses from appellant. Appellant acknowledges that he was the first to speak. He argues, however, that he did so in reaction to Edwards's statement that the officers wanted to talk to appellant about a 1992 murder because they believed he had helpful information. Because there was no ambiguity about his initial assertion of *Miranda* rights, Edwards should not have encouraged appellant to talk about the murder and should have informed him that his invocation prevented further discussion about the murder. Alternatively, appellant argues, Edwards should have sought clarification from appellant in a form of speech that would not reasonably be construed as calling for an incriminating response.

Appellant argues that the trial court also erred in concluding his second invocation of *Miranda* was equivocal. In between the first and second invocations, appellant states, Edwards had accused appellant of a strong-arm robbery of a lady at 17th Street and Junipero Avenue in which he had shot and killed the lady. Appellant denied it and again invoked his *Miranda* rights. Appellant asserts that Edwards's report states that appellant

followed his second invocation with a request that the officers tell him about the incident, but Edwards's testimony was that the second invocation was followed by Edwards's offer to jog appellant's memory. Appellant argues that the latter is the more likely occurrence. In any event, appellant contends, he made a second unambiguous invocation of his *Miranda* rights, and Edwards was obligated to honor it by immediately terminating the interrogation. Moreover, appellant contends, the offer to jog appellant's memory constituted an interrogation because Edwards's statements were reasonably likely to elicit an incriminating response from appellant. This in fact occurred, because after the second invocation appellant said he had been arrested because a White guy had accused him of robbery and had taken appellant's gun from him.

Appellant further argues that the erroneous admission of his statements was not harmless beyond a reasonable doubt, since the statements about the robbery of Jason Kennedy had the impact of a confession to the murder. The statements helped cure evidentiary lacunae in the prosecution witnesses' testimony by revealing that appellant admitted attempting a robbery at gunpoint on the same day as the murder and in the same neighborhood.

V. Application of Law to Facts: Implied Waiver Found

On independent review of the record, we agree with the trial court and conclude that, under the particular circumstances of this case, the portions of appellant's statements admitted into evidence were made after appellant had impliedly waived his right to remain silent. We accept the trial court's credibility determinations as to the testimony of Detective Edwards. We note that appellant claims Edwards's report stated that appellant followed his second invocation with a request that the officers tell him about the incident, but Edwards's testimony indicated the second invocation was followed by Edwards's offer to jog appellant's memory. Edwards's report was made closer in time to the interview, and is more likely to be accurate. In any event, Edwards clarified his testimony to the court and said that appellant asked him and his partner to tell him about the incident before Edwards showed him the photographic lineups from 1992.

As noted previously, the United States Supreme Court recognized in *North Carolina v. Butler*, *supra*, 441 U.S. 369, that an express waiver of *Miranda* rights is not required in order for there to be a valid waiver. In *North Carolina v. Butler*, the defendant was advised of his *Miranda* rights, said he understood those rights, refused to sign an "'Advice of Rights'" form, and told FBI agents that, "'I will talk to you but I am not signing any form.'" He then made inculpatory statements. At no time did the defendant request the presence of counsel or attempt to terminate the agents' questioning. (*Id.* at pp. 370-371.)

The court explained that "[a]n express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case. As was unequivocally said in *Miranda*, mere silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated." (*North Carolina v. Butler*, *supra*, 441 U.S. 369 at p. 373, fn. omitted.) The court added that "the question of waiver must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'" (*Id*. at pp. 374-375.)

In *Moran v. Burbine*, *supra*, 475 U.S. 412, the defendant had executed a series of written waivers acknowledging he understood his rights and chose to waive them. (*Id*. at p. 417.) The court made clear that a valid waiver required both an understanding of constitutional rights and a voluntary waiver of those rights prior to questioning. "The [waiver] inquiry has two distinct dimensions. [Citations.] First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have

been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." (*Id*. at p. 421.) The court determined that "[o]nce it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law." (*Id*. at pp. 422-423, fn. omitted.)

Appellant's implied waivers meet these criteria. It is clear from the testimony of Edwards that appellant understood his rights. It is also clear that he was not coerced or intimidated into asking the questions he posed in both instances, immediately after saying he did not want to talk. As stated in *Moran v. Burbine*, *supra*, 475 U.S. at page 425, "[t]he purpose of the *Miranda* warnings . . . is to dissipate the compulsion inherent in custodial interrogation . . . ." The *Miranda* decision attempted to reconcile the legitimate efforts of police to seek admissions and the constitutionally impermissible compulsion of such admissions by giving the defendant the power to exert a degree of control over the course of the interrogation. (*Moran v. Burbine*, *supra*, at p. 426.) Appellant was given the power to control the interview with Edwards and his partner by being given the appropriate warnings, and he chose to ask them exploratory questions. Appellant said he understood his rights, and he had the capability and experience to understand them, considering his age and the fact that he suffered two convictions as an adult and several sustained petitions as a juvenile. The two detectives did not attempt to intimidate, mislead, or coerce appellant, and appellant never asked for an attorney.

We do not agree that by answering appellant's question after his first invocation, Edwards was in effect engaging in further interrogation. Edwards answered appellant's first question -- which was posed before any mention of the 1992 case was made -- in a direct manner with speech that cannot reasonably be construed as calling for an incriminating response. (See *Rhode Island v. Innis* (1980) 446 U.S. 291, 300-301

[interrogation includes words or actions reasonably likely to elicit an incriminating response]; *People v. Clark* (1993) 5 Cal.4th 950, 982, 985 [interrogation did not occur when police officer answered suspect's question about possible sentence in abstract terms].) Edwards then returned to the waiver form and asked appellant to sign it. Immediately after appellant refused to sign the waiver form, he asked the detectives to tell him what murder they were talking about. Edwards and his partner reasonably took appellant's further inquiry as an implied waiver, and appellant was asked where he had lived in 1992. Appellant answered the question, as well as the question about what he had been arrested for in 1992. As the questioning continued appellant did not assert his right to remain silent until the third instance, beyond which no statements were admissible.

In *People v. Cunningham* (2001) 25 Cal.4th 926, cited by appellant, the California Supreme Court stated that Cunningham's initial statement that he wanted an attorney was an unambiguous request for counsel, and he was therefore "not subject to further interrogation by the police until counsel was made available to him." (*Id.* at p. 993.) The court defined interrogation as express questioning, or words or actions on the part of the police that "'are reasonably likely to elicit an incriminating response from the suspect.'" (*Ibid*., quoting *Rhode Island v. Innis*, *supra*, 446 U.S. 291, 301.) The police officer in that case testified that he may have restated to the suspect that the police could obtain an attorney for him in between the suspect's initial invocation of the right to counsel and a subsequent statement that he was willing to talk to the officers until he thought he needed an attorney. The court concluded that the officer's remark was not the functional equivalent of interrogation. In the instant case, unlike in *People v. Cunningham*, however, Edwards and his partner did not make any remarks to appellant before he asked them questions, which he did immediately after saying he did not want to talk.

People v. Harris (1989) 211 Cal.App.3d 640, a case upon which appellant relies, is also distinguishable. Harris, a murder suspect, fled after the crime but spoke with police by telephone. (*Id*. at pp. 644-645.) The police told Harris he need not worry if he did not commit the murder, but he should return and "'get it straightened out.'" (*Id*. at p.

645.) When Harris returned, a Sgt. Ward and a Lt. Poole admonished him per *Miranda* and asked if he wished to speak with them. Harris's reply was, "'Not really.'" (*Ibid*.) The interview was terminated, and Harris indicated "'No'" on the written waiver form. (*Id*. at pp. 645-646.) Ward told Harris he would be taken across the street and booked for murder. Ward later said that Harris seemed surprised and shocked. Ward said to Harris, "'"'I thought you were going to come back and straighten it out.'"'" As Ward moved to the door, Harris said he did wish to straighten it out. Ward told him he could not talk with Harris because Harris had exercised his rights. Harris said he was scared, wanted to talk, but his parents had told him not to talk because they were hiring a lawyer. (*Id*. at p. 646.)

Ward left the interview room but believed Harris wished to speak with him. He testified that he was not sure if Harris was waiving his rights, invoking them, or acting as his parents had ordered. Ward told Poole he thought Harris wanted to talk to them, and the two officers entered the interview room and turned on the tape recorder. Ward said to Harris that Harris had indicated he might want to change his mind and talk, and asked if that was true or not. Harris indicated it was true, and Ward reminded him that he had been read his rights and asked Harris if he understood those rights. Harris said he did, and after Ward went to great lengths to ensure Harris was making a voluntary decision, Harris confessed to helping the murderer dispose of the body. In a second interview, after again being informed of his rights, Harris admitted participating in the murder. (*People v*. *Harris*, *supra*, 211 Cal.App.3d at p. 646.)

The court stated that the issue was whether Ward "scrupulously honored" Harris's request not to talk. (*People v. Harris*, *supra*, 211 Cal.App.3d at p. 647.) The court found that Ward's remark about booking Harris for murder was merely a factual statement and could not be considered as a reopening of dialogue or a reinitiating of the interrogation. (*Id*. at pp. 647-648.) It found, however, that Harris's look of shock and surprise triggered Ward's further comment about straightening the matter out. The court stated that, under the circumstances, it appeared that Ward was responding to Harris's reaction and further clarifying the decision to book him for murder. The court determined that Harris was led

to believe that if he had carried out his plan to clear up the matter, he might not have been booked for murder. (*Id*. at p. 648.)

Acknowledging that it was a difficult question, the *Harris* court decided that the comment by Ward about coming back to straighten things out was the functional equivalent of further questioning. (*People v. Harris*, *supra*, 211 Cal.App.3d at p. 648.) The court believed it was reasonably foreseeable that a suspect would react to Ward's statement as a prodding invitation to further discussion about the incident. The comment had the effect of loosening Harris's tongue. (*Id*. at pp. 648-649.) If Ward had scrupulously honored Harris's right to remain silent, he would not have encouraged further conversation about the murder. (*Id*. at p. 649.) Therefore, the trial court erred in admitting the first confession. (*Ibid*.)

In contrast to the succession of events in *Harris*, appellant was the one to initiate further conversation. He twice asked Edwards and his partner what they wanted to talk to him about. Edwards and his partner said nothing designed to loosen appellant's tongue. Even if the question by Edwards's partner about where appellant lived in 1992 were characterized as "likely to elicit an incriminating response," it was asked only after appellant indicated he wanted to know more about the murder.

Oregon v. Bradshaw (1983) 462 U.S. 1039, which addressed the issue of a suspect's initiation of dialogue with police, is instructive in this case. The suspect, Bradshaw, denied his involvement in a fatal traffic accident and said he wanted an attorney "'before it goes very much further.'" (*Id*. at pp. 1041-1042.) The officers questioning him immediately terminated the conversation. Later, when he was being transferred to the county jail, Bradshaw asked a police officer, "'Well, what is going to happen to me now?'" The officer told Bradshaw that he did not have to talk, that he had requested an attorney, and that the officer did not want Bradshaw talking to him unless he desired to do so. The officer told Bradshaw, "'it has to be at your own free will.'" Bradshaw said he understood. Bradshaw and the officer then discussed where Bradshaw was being taken and the offense with which he would be charged. The officer suggested Bradshaw take a polygraph to help himself, and Bradshaw agreed to do so. The

following day, Bradshaw underwent a polygraph examination after being advised again of his *Miranda* rights. The examiner told Bradshaw that he did not believe he was telling the truth. At that point, Bradshaw recanted his earlier story and admitted driving the vehicle after consuming a great deal of alcohol. Bradshaw later moved to suppress his statements. (*Id*. at p. 1042.)

The Supreme Court stated that initiation of a conversation by a suspect did not always amount to a waiver of a previously invoked right to counsel. (*Oregon v. Bradshaw*, *supra*, 462 U.S. at p. 1044.) There always remains the question of whether the purported waiver was knowing and intelligent under the totality of the circumstances, which include the fact that the suspect and not the police reopened the dialogue. (*Id*. at p. 1045.) The court stated that there were situations in which a bare inquiry by a police officer or a suspect should not be considered the initiation of a dialogue. There were also some inquiries, such as a request to use a telephone, that were "routine incidents of the custodial relationship." (*Ibid.*) Bradshaw's question about what was going to happen to him, however, "could reasonably have been interpreted by the officer as relating generally to the investigation" rather than an inquiry arising out of the custodial relationship. (*Id*. at p. 1046.) The court then determined that Bradshaw's waiver was knowing and intelligent under the totality of the circumstances. (*Id*. at pp. 1046-1047.)

As in *Oregon v. Bradshaw*, the questions appellant posed indicated a desire and willingness on his part for a generalized discussion about the investigation. The questions appellant asked Edwards and his partner constituted a waiver of his rights under the totality of the circumstances -- including the circumstance that he reopened the dialogue as well as those mentioned *ante*. It is clear that appellant understood his rights and made an uncoerced choice to elicit information from the police, which resulted in a valid implied waiver.

VI. Harmless Error

Even assuming the trial court erroneously admitted appellant's statements, however, no reversible prejudice to appellant occurred. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 306-310 [violations of constitutional rights subject to harmless error

analysis under standard of *Chapman v. California* (1967) 386 U.S. 18]; *Chapman v. California*, *supra*, 386 U.S. 18 (*Chapman*); see *People v. Cunningham*, *supra*, 25 Cal.4th at p. 994 [employing *Chapman* standard and determining admission of evidence obtained in violation of *Miranda* was harmless beyond a reasonable doubt].) The evidence against appellant was very strong. There were eyewitness identifications by Jason and Robert Kennedy. Jason testified that he recognized the purse snatcher who shot Martinez as the same man who had tried to rob him at gunpoint earlier in the day. Jason and Robert identified appellant in a field lineup in 1992, and they also identified appellant in a photographic lineup. Bedolla testified that appellant had showed him a gun at the liquor store before the Kennedy twins were accosted. Detective Boston testified that Bedolla told him that appellant put the gun to the back of one of the Kennedys and demanded money. Thus, the information in appellant's statements was revealed to the jury in any event. Boston also testified that Bedolla told him that appellant shot Martinez after grabbing her purse. Silva testified that he saw appellant and two other boys running after hearing a gunshot. Finally, gunshot residue was found on appellant's hands shortly after Martinez's murder. We conclude that, beyond a reasonable doubt, the result of appellant's trial would not have been more favorable to appellant had his own statements about the attempted robbery not been admitted.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

NOTT

We concur:

_____, P.J.

BOREN

_____, J.

ASHMANN-GERST